RECEIVED

Mar 18 2026

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Charleston County
Jennifer B. McCoy, Circuit Court Judge

Circuit Court Case No. 2016-CP-10-03783

Court of Appeals Case No. 2021-001050
Opinion No. 6099 (S.C. Ct. App. filed May 21, 2025)

Supreme Court Case No. 2025-001224

The Retreat at Charleston National Country Club Home Owners Association, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime, ……...Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollio Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; CollenBatissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado, ……Defendants,

Builders FirstSource-Southeast Group, LLC,……..Third-Party Plaintiff and Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; and East Coast Carpentry, ……Third-Party Defendants.

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.;

and L&G Construction Group, LLC are the Respondents.

BRIEF OF RESPONDENT WS CONTRACTORS, LLC

John P. Linton, Jr. (SC Bar # 79130)
Jennifer S. Ivey (SC Bar # 102533)
Walker Gressette & Linton, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200

Attorneys for Respondent WS Contractors, LLC

TABLE OF CONTENTS

Table of Authorities iv

Statement of the Issues 1

Statement of the Case 1

Statement of Facts 8

Argument 19

I. The court of appeals' decision on the applicability of S.C. Code § 32-2-10 to BFS's claim for attorney's fees is final, and outside the scope of this Court's review. WSC should be dismissed from this appeal. 22

II. BFS's contractual indemnity claim for attorney's fees is based on indemnity language contained in its master subcontractor agreement that is illegal, enforceable, and void as against public policy. The court of appeals properly applied S.C. Code § 32-2-10 and the clear and unequivocal standard to the attorney's fee language because it is without regard to BFS's fault. 23

A. The duty to defend and attorney's fee provisions of BFS's master subcontractor agreement require BFS's subcontractors to indemnify BFS for its attorney's fees without regard for fault 23

B. The indemnity provisions in BFS's master subcontractor agreement for attorney's fees are not stated clearly and unequivocally, further rendering the agreement unenforceable…. 27

Conclusion 29

TABLE OF AUTHORITIES

CASES

Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971) 23

Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 409 S.C. 490, 762 S.E.2d 696 (2014) 27

Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) 25

Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993) 26

Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E. 2d 166 (Ct. App. 2018) ……..……18, 19, 27, 28, 29

D.R. Horton, Inc. v. Builders First-Source-Southeast Group, LLC, 422 S.C. 144, 810 S.E.2d 41, (Ct. App. 2018) 25

Federal Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 378 S.E.2d 56 (1989) 27

Fields v. Melrose, Ltd. P'ship, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) 27

Fountain v. Fred's, Inc., 429 S.C. 533, 39 S.E.2d 475 (Ct. App. 2020) 26

McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 759 S.E.2d 136 (2014).....26

Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 148 S.E.2d 742 (1966) …….23

Sherlock Holmes Pub, Inc. v. City of Columbia, 389 S.C. 77, 697 S.E.2d 619 (Ct. App. 2020)…26

Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 579 S.E.2d 132 (2003) 28

White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342 (2004) 26

STATUTES

S.C. Code § 32-2-10.....5, 6, 7, 18, 21, 22, 23, 24, 25, 27, 29

RULES

Rule 242, SCACR.....22

STATEMENT OF THE ISSUES

This is a case where a large material supplier and contractor, Petitioner Builders FirstSource – Southeast Group, LLC ("BFS"), asks the court to revive its contractual indemnity claim against its subcontractors, including this Respondent, WS Contractors, LLC ("WSC"). The issues relating to BFS's contractual indemnity cause of action against WSC and the contract upon which it is premised are as follows:

I. Whether WSC remains a proper party to this appeal when BFS's claim against WSC is limited to a claim for attorney's fees, the court of appeals held the contract language relating thereto violates S.C. Code § 32-2-10, and this Court declined certiorari on this specific issue?

II. Whether S.C. Code § 32-2-10 and the clear and unequivocal standard apply to BFS's claims for attorney's fees when its claim therefore rests on language which entitles BFS to recover its attorney's fees even when it is negligent?

STATEMENT OF THE CASE

BFS's contractual indemnity claims against its subcontractors, who are the Respondents in this appeal, arise out of a construction defect suit involving The Retreat at Charleston National Country Club, a multi-family development in Mount Pleasant, South Carolina. (A. pp. 174-186).

The Plaintiffs in the underlying suit are two homeowner associations, The Retreat at Charleston National Country Club Home Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime. (Id.). The Plaintiffs initiated suit against the developer, Winston Carlyle Charleston National, LLC, the general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually, on July 22, 2016, alleging negligence, gross negligence, and breach of express and implied warranties, as well as breach of fiduciary duties with respect to the developer. (Id.).

The general contractor subcontracted a portion of the work (namely, framing, windows and doors) on the project to BFS. (A. p. 380, ¶ 9 – A. p. 381, ¶ 10; A. p. 374, ¶ 3). BFS is a Delaware limited liability company who furnishes building materials and provides turn-key contracting and installation services. (A. p. 374, ¶ 3; A. p. 875, lines 11-16).[1]

As a result thereof, on May 1, 2017, the Plaintiffs filed an amended complaint adding BFS as an additional defendant. (A. p. 202, ¶ 57 – A. p. 207, ¶ 64). The Plaintiffs allege BFS provided the framing, window, and door materials, including all related components, and installed such elements of the project. (A. p. 351, ¶ 9 – A. p. 352, ¶ 10). They further allege the materials BFS supplied were defective,[2] and that BFS failed to install the materials in accordance with the plans, specifications, and applicable building codes. (A. p. 202, ¶ 57 – A. p. 207, ¶ 64).

BFS responded to the Plaintiffs' complaints by denying liability and alternatively asserting third-party claims against its subcontractors. (A. p. 208). WSC served as one of BFS' subcontractors on the project and performed work on certain buildings during one phase of the project and, like the other Respondents, was sued by BFS.[3] (A. pp. 811-825). Through subsequent amended pleadings, Plaintiffs asserted direct claims against WSC. (A. p. 366, ¶ 86 – A. p. 368, ¶ 93). Accordingly, BFS's claims against WSC were cast as crossclaims for indemnity (contractual

[1] While BFS did not serve as the general contractor on this project, it holds an unlimited general contractor's license issued by the South Carolina Department of Labor, Licensing, and Regulation. (A. p. 875, lines 11-16; A. p. 879).

[2] By way of example, Plaintiffs' forensic expert specifically contends that the windows selected have inadequate design pressure ("DP") ratings which require replacement of the windows. A. pp. 1107, 1108, and 1111. BFS supplied the windows for the project. (A. p. 864).

[3] WSC was only involved in the construction of Buildings 22 through 31 at the project which were constructed between 2012 and 2014. (A. pp. 822-825).

and common law),[4] breach of express and implied warranties, breach of contract, and negligence. (A. p. 437, ¶ 124 – A. p. 445, ¶ 155).

WSC resolved its claims with Plaintiffs in December 2019. (A. p. 766-780). In doing so, WSC procured an issue release from Plaintiffs in favor of BFS, the developer, and the general contractor relating to or arising from WSC's scope of work on the project or otherwise relating to for WSC's acts, omissions, labor, materials, work, or involvement on the project. (Id.).

WSC thereafter filed a motion for summary judgment as to BFS's crossclaims on January 22, 2020. (A. p. 708). WSC amended its motion for summary judgment twice before it was heard by the circuit court, providing additional arguments and exhibits with each amendment.[5] (A. p. 737; A. p. 781). WSC further supported its motion for summary judgment by way of its memorandum of law filed on October 30, 2020. (A. p. 848). BFS did not file a memorandum or brief in opposition to WSC's motion for summary judgment or any affidavits or exhibits, however, it opposed WSC's effort to get out of this case and argued against it at the hearing on the motion.

The Honorable Jennifer B. McCoy heard WSC and the subcontractor-Respondents' motions for summary judgment as to BFS's crossclaims on November 6, 2020. (A. p. 1386). BFS admitted its causes of action for breach of express and implied warranties, breach of contract, and

[4] BFS refers to equitable indemnity as common law indemnity. Equitable and common law indemnity are used interchangeably herein.

[5] WSC made the applicable BFS master subcontractor agreements, its Settlement Agreement, General Release, and Issue Release with the Plaintiffs, and certain circuit court orders part of the record by filing the same as exhibits to its amended motion for summary judgment filed on October 19, 2020. (A. pp. 785-845).

negligence failed as a matter of law and were subject to dismissal. (A. p. 1392, lines 4-21; A. p. 1081; A. pp. 1182-1183); (A. p. 1393, lines 4-21; A. pp. 1083-1084; A. pp. 1182-1183).[6]

BFS maintained its contractual indemnity claim against its subcontractors though.[7] With respect to WSC, BFS's counsel argued that notwithstanding WSC's resolution of BFS's potential liability to Plaintiffs on account of WSC's work, BFS was entitled to recover its attorney's fees from WSC pursuant to the contractual indemnity provisions contained in BFS's master subcontractor agreement. (A. pp. 1426-1428). BFS's counsel characterized attorney's fees as "a consequence of damages occasioned by a claim of indemnity" and explained BFS's "claim for attorney's fees is for attorney's fees arising out of the negligence that we contend Freeman (sic.)[8] and the other subcontractors were guilty of, which has redoubted (ph) to our detriment in the form of liability to third parties." (A. p. 1422, lines 8-14).

WSC's counsel argued that its scaled-back claim against WSC did not change the fact that the contractual indemnity provisions upon which BFS relies on to recover its attorney's fees require WSC to indemnify BFS for its attorney's fees even if BFS is solely at fault, which violates South Carolina law. (A. p. 1409). WSC's argument in chief was that BFS could not recover attorney's fees from it pursuant to its subcontractor agreement because the agreement was unenforceable under South Carolina law. (A. pp. 781-894, 1386-1450). WSC joined in and adopted

[6] BFS has not taken up any appeal of the dismissal of these claims. See generally (A. pp. 1373-1385; A. pp. 1815-1914).

[7] BFS's contractual indemnity claim against WSC is based on "Version – 5/17/06" of BFS's form master subcontractor agreement; i.e., the "Later Contracts" as designated by the court of appeals. (A. pp. 785-798).

[8] WSC's lawyer in the circuit court proceeding was Ian Freeman, Esq., formerly of this firm. BFS's counsel was ostensibly referring to WSC by reference to Mr. Freeman's client.

the arguments made by counsel for Respondents ECC Contracting and East Coast Carpentry, to the extent those arguments applied to the claims against WSC. (A. p. 1404).

Judge McCoy granted summary judgment to WSC on all of BFS's crossclaims but its equitable indemnity claim via a Form 4 Order entered on May 10, 2021. (A. p. 16).

However, on July 29, 2021, Judge McCoy entered an 18-page formal order granting summary judgment to WSC on all claims asserted by BFS, including the equitable indemnity claim. (A. pp. 84-101). Because these same indemnity issues have been adjudicated, adversely to BFS, in multiple other lawsuits against its subcontractors, Judge McCoy found that BFS had a full and fair opportunity to litigate identical issues in those prior cases and that in each of those cases, the contract terms were actually litigated, directly determined, and the issues were essential to the judgments rendered therein. (A. pp. 89-92). Judge McCoy concluded that the doctrine of collateral estoppel precluded BFS from re-litigating the issues determined in those prior cases, including whether the indemnity provisions contained in its master subcontractor agreements fail to meet the clear and unequivocal standard, violate South Carolina public policy, and/or fail to meet the requirements of South Carolina law. (A. pp. 89-92).

In addition to finding the doctrine of collateral estoppel was applicable and barred BFS's claims, Judge McCoy also independently found the indemnity and duty to defend provisions of the BFS master subcontractor agreement are unclear, unconscionable, unintelligible, conflicting, and are unenforceable as a matter of law. (A. p. 99). Judge McCoy specifically found the indemnity and duty to defend provisions violate South Carolina public policy and S.C. Code § 32-2-10, making them illegal and unenforceable. (A. p. 99).

With respect to the equitable indemnity claim, Judge McCoy opined in her formal order the claim failed as a matter of law because the issue release absolves and releases BFS from all

liability stemming from any acts or omissions of WSC; therefore, any prospective liability of BFS to Plaintiffs relative to the project would necessarily be derived from BFS's negligence or fault without any reference to WSC. (A. p. 99).

On August 9, 2021, BFS filed a motion for reconsideration of Judge McCoy's formal order. (A. pp. 1373-1385). In its motion for reconsideration, BFS stated it was only "seeking only recovery of attorney's fees and costs expended in defending against the plaintiffs claims." (A. p. 1379).[9] BFS's arguments therein were that the attorney fee issue was a different issue than the other trial courts considered thereby precluding the application of collateral estoppel, that the contract language relating to attorney's fees were not subject to the heightened clear and unequivocal standard or S.C. Code § 32-2-10, and that severance was possible and appropriate. (A. pp. 1373-1385).

BFS did not ask Judge McCoy to reconsider her decision dismissing BFS's equitable or common law indemnification claim. (A. pp. 1373-1385).

Judge McCoy denied BFS's motion for reconsideration on August 23, 2021. (A. pp. 137-138). On September 22, 2021, BFS timely filed its notice of appeal of Judge McCoy's formal order granting summary judgment to WSC and her subsequent order denying BFS's motion for reconsideration.[10] The parties submitted their briefs to the court of appeals in 2022. As it relates to its claim for attorney's fees, BFS took with the circuit court's finding that the third paragraph of text in the indemnity section of its master subcontractor agreement violates S.C. Code § 32-2-10. See (A. pp. 1850-1852, 1912-1913).

[9] BFS has not amended its pleadings to conform to the position that it took at the hearing and in its motion for reconsideration.

[10] BFS filed separate notices of appeal with respect to each of the Respondents and the respective circuit court orders, but the court of appeals consolidated the appeals over BFS's objection. See Order entered in Appellate Case No. 2021-001050 on January 28, 2022.

Judges McDonald, Thomas, and Verdin heard the appeal on March 5, 2024, and affirmed all eight orders on February 12, 2025. (A. pp. 2126-2155). BFS filed a petition for rehearing with the court of appeals on February 27, 2025. (A. pp. 1565-1584). BFS did not take up the attorney's fee issue in its petition for rehearing. (Id.).

The court of appeals denied BFS's petition for rehearing on May 21, 2025, and refiled a substituted opinion. (A. pp. 1532-1561).

The court of appeals rejected BFS's argument that its request to be indemnified for its attorney's fees fell outside S.C. Code § 32-2-10. (A. pp. 1555-1557).

BFS filed its petition for a writ of certiorari on June 20, 2025. (A. pp. 1624-1651). BFS presented six questions on appeal:

Questions Presented

1. When a contractor files a general third-party claim against its subcontractor seeking to recover in contractual indemnity for all damages for which it might be held liable, does such claim include those damages for which the subcontractor is either solely or concurrently responsible?
2. Should a contract provision imposing an obligation to indemnify- specifically as it relates to a contractor's claim for damages for which its subcontractor is either solely or concurrently responsible - be construed in accordance with precedent and with the laws governing contracts generally, or should it for the first time be subject to the heightened "clear and unequivocal" standard that would be applicable if the contractor were solely seeking indemnity for its *own* negligence?
3. Should the court restrict its inquiry to the provision of the contract directly at issue, that is, the indemnification provision, rather than considering provisions under which no cause of action has been brought in this case, and should the inquiry into the meaning of the contract always give defined terms in the parties' contract the limited meaning ascribed to them in the contract?
4. Does the court's refusal to honor the severance language in this contract, and its consequent refusal to sever the offending language and thus save the contract, violate the Supreme Court's precedent?
5. **Does S.C. Code Section 32-2-10 by its specific provisions apply only to agreements in indemnification, and does its silence regarding attorneys' fees reflect both legislative intent and a common law imperative that attorneys' fees do not fall within the scope of Section 32-2-10?**
6. Is a trial court's order that is on appeal, and thus on which judgment has not yet been finally entered, considered sufficiently "final" for collateral estoppel or res judicata?

(A. pp. 1628-1629) (emphasis added).

On December 16, 2025, this Court granted BFS's petition for a writ of certiorari as to questions 1-4 and 6 above but denied certiorari as to question 5 relating to attorney's fees.

BFS filed its Brief in this case on January 26, 2026, briefing solely the issues to which certiorari was granted. See generally (Pet. Brief). BFS does not specifically address its claims against WSC for attorney's fees in its Brief, nor does it address its general claim against all Respondents for attorney's fees. (Id.).

STATEMENT OF FACTS

WSC is in a unique position as among Respondents because the only damages BFS seeks from WSC are attorney's fees which is an issue this Court did not grant certiorari on.

The unique posture of BFS's claims against WSC derives from the settlement WSC reached with Plaintiffs more than six years ago. The facts pertaining to this settlement – specifically, the issue release in favor of BFS – are critical to the analysis of BFS's arguments on appeal.

WSC settled with the Plaintiffs in December 2019. A. p. 766-780. WSC and its subcontractors paid the Plaintiffs a total of $1,000,000.00 in exchange for Plaintiffs: (a) releasing their direct claims against them; and (b) further agreeing to release BFS, the developer, and general contractor from liability arising from any of their errors, omissions, and scope of work. Id. The language of the issue release contained within the settlement agreement is as follows:

> 6. In consideration of the receipt of the Settlement Amount, Releasors hereby release, acquit, and forever discharge Builders FirstSource, Inc., Builders FirstSource Southeast Group, Winston Carlyle Charleston National, LLC, Colin R. Campbell Construction, Inc., C.R. Campbell Construction Co., Inc., Colin Campbell Construction, LLC, and their respective owners, parents, subsidiaries, directors, officers, shareholders, members, managers, principals, employees, agents, heirs, assigns, and Colin Campbell, individually (hereinafter collectively

"Issue Releasees") relating to or arising from (a) the scope of work for the Project identified in **Exhibit A** attached hereto involving Building Numbers 22 through 31, inclusive, and made a part hereof, including, without limitation, the acts, omissions, labor, materials, work, and involvement of Issue Releasees with respect to the scope of work for the Project identified in Exhibit A, and (b) the acts, omissions, labor, materials, work, or involvement of the Settling Defendants and Releasee(s) identified in Paragraph 2 at the Project known as The Retreat at Charleston National Country Club. The foregoing Issue Releasees are not discharged or released for anything other than the scope of work attached as Exhibit A and the acts, omissions, labor, materials, work, or involvement of anyone other than the Settling Defendants and Releasee(s) identified in Paragraph 2. The releases contained in this Paragraph are specific to Issue Releasees named above, and in no way limit the rights of Releasors with respect to claims against any other parties, and do not release any respective insurers with respect to claims against any other parties, and do not release any party except as specifically set forth herein.

7. For the consideration set forth above, Releasors covenant to not either a) seek to impose or b) to impose liability upon the Issue Releasees at trial of the Lawsuit for the scope of work identified in Exhibit A, including the Issue Releasees' involvement in such scope of work, and the acts, omission, labor, materials, work, or involvement of the Settling Defendants, and Releasee(s) at or for the Project. Releasors also agree that at trial of this Lawsuit, Releasors shall be precluded from raising or presenting against the Issue Releasees any testimony, documents, evidence, opinions, and arguments concerning alleged defects, deficiencies, non-conformities, breaches, non-performance, repairs, and resulting damages relating to the scope of work attached hereto as Exhibit A or the acts, omissions, labor, materials, work, or involvement of the Settling Defendants and Releasee(s) at or for the Project. The legal elements of collateral estoppel are not required for such issue preclusion to apply and to act as a bar in the Lawsuit or any other proceeding. The Court of Common Pleas of South Carolina, Charleston County, shall retain jurisdiction to enforce this Agreement in all respects. Releasors agree and consent to entry by the Court of an order in limine to exclude all testimony, documents, opinions, and evidence concerning the foregoing issues at trial or any other proceeding against the Issue Releasees. This issue release is a material element of this Settlement Agreement. Any breach of the terms of this issue release or such an order entered by the Court shall be deemed harmful and prejudicial to the Settling Defendants, and shall constitute a material breach of this Agreement.

(A. pp. 768-769).

BFS did not dismiss its crossclaims against WSC for equitable and contractual indemnity following this settlement. Instead, BFS kept BFS in this case and opposed WSC's motion for

summary judgment, appealed the orders granting WSC's motion, and petitioned this Court for review of the court of appeals' affirmance thereof.

In doing so, BFS admitted it had no basis for seeking indemnity against liability from WSC.

At the hearing before the circuit court on WSC's motion for summary judgment, BFS's counsel stated that BFS was only seeking to recover its attorney's fees from WSC. (A. pp. 1426-1428). After WSC's motion was granted, BFS reiterated the same in its motion for reconsideration, there stating that BFS is "seeking attorney's fees pursuant to the clear provisions of its agreement with WSC." (A. pp. 1376; see also A. p. 1379 ("BFS is, in fact, seeking only recovery of attorney's fees and costs, expended in defending against the plaintiff's claims arising out of the performance of WSC's work.")).

In its reply brief filed in the court of appeals, BFS stated:

> Respondent W.S. Contractors is in the unique position of having obtained an issue release from the Plaintiffs in favor of Appellant with respect to the scope of work of WS Contractors. **Thus, Appellant has agreed that, as to W.S. Contractors, Appellant is only pursing its claims for attorney's fees.**

(A. p. 1912) (emphasis added).

BFS bases its claim for attorney's fees on its contractual indemnity crossclaim in its operative pleading. (A. pp. 414-454). Its indemnity crossclaim is found in Paragraphs 132-138 thereof, which read as follows:

> 132. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
>
> 133. That the Plaintiff, The Retreat at Charleston National Country Club HOA, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime, have sued Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by deficiencies in framing, including but not limited to deficiencies in the installation of windows, doors, and related components, during original construction of the subject structures.

134. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Fourth Amended Complaint.

135. That the respective subcontracts between this Defendant and the Cross Claim Defendants, provide for contractual indemnification in favor of BFS.

136. That the Cross Claim Defendants served as subcontractors to BFS in connection with their services at the subject structures. Regardless, therefore, of any specific contractual obligation to indemnify, there exists a special relationship between this Defendant, and the Cross Claim Defendants, sufficient to impose obligations of indemnity against the aforesaid Cross Claim Defendants, in favor of BFS.

137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the Cross Claim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

138. That BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

(A. pp. 440-441).

As noted above in WSC's Statement of the Case, Judge McCoy granted summary judgment to WSC as it relates to BFS's common law or equitable indemnity claim. (A. p. 99). Accordingly, BFS's sole claim is a contractual indemnity claim, which relies on "Version – 5/17/06" of BFS's form master subcontractor agreement. (A. pp. 785-798).

The "clean provisions" of BFS's agreement with WSC that provide one-way indemnification in BFS's favor and terms related thereto set out below. The bold and all caps is

in the original, underline emphasis is added to the highly pertinent provisions relating to attorney's fees or the duty to defend.

SECTION 1. Introduction.

> **a. Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the **"Work"**) from time to time for Contractor on any project (the **"Project"**). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor's customer (the **"Owner"**). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the **"Contract Documents"**) and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contract. Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.
>
> ….

SECTION 2. Materials and Workmanship.

> Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

. . . .

c. Protection of Work. Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications . . . If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third-party beneficiaries of this Agreement and shall have the power to enforce

this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

. . . .

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM

BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

. . . .

SECTION 8. Payment to Subcontractor.

. . . .

a. Payment by Owner is Condition Precedent. Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work (**"Cost of Work"**) performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accept Subcontractor's Work and Contractor received Payment from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

i. INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY

> **SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.**

(A. p. 1489-1500).

To WSC's knowledge, there is only one other subcontractor of BFS's similarly situated as WSC, McDaniel Construction Co. ("McDaniel"). Like WSC, McDaniel was a subcontractor of BFS who BFS brought into this case. (ROA pp. 1532-1537).[11] On September 6, 2019, McDaniel moved for summary judgment as to BFS's indemnity crossclaim because Plaintiffs had conceded there were no issues as to McDaniel's work and stipulated to dismissal of McDaniel with prejudice. (ROA p. 1569). In spite of this stipulation, whereby Plaintiffs specifically conceded there were no defects with McDaniel's work, BFS refused to dismiss its crossclaims against McDaniel. (ROA p. 1569).

[11] These records were not made part of the Appendix. They are part of the court of appeals record (see Order entered by the court of appeals in Appellate Case No. 2021-001050 on December 5, 2022) and therefore the citations to the "ROA" correspond to the court of appeals record on appeal until the Appendix is corrected.

As with WSC, BFS wanted attorney's fees from McDaniel which it contended was recoverable pursuant to the indemnity language in "Version – 5/17/06" of its master subcontractor agreement (i.e., the same form agreement WSC allegedly entered). See (ROA p. 1572; ROA pp. 1577-1600). McDaniel argued that its liability was not in question in light of the Plaintiffs' dismissal of claims against it, that the issues relating to the enforceability of the indemnity language had been previously ruled upon in prior cases, and that BFS's contractual indemnity language, including the "defend and hold harmless" language contained therein, violated the South Carolina Anti-Indemnity Statute codified at S.C. Code § 32-2-10, and were neither clear nor unequivocal under Concord & Cumberland, Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018). (ROA pp. 1569-1575).

BFS filed an extensive memorandum in opposition to McDaniel's motion for summary judgment. (ROA pp. 1538-1566). BFS asserted McDaniel's liability was still in question and that Plaintiffs' stipulation of dismissal of McDaniel did not preclude Plaintiffs from pursuing claims against BFS regarding McDaniel's defective work. (A. p. 1553). As BFS put it, "[b]ecause Plaintiffs had not released their claims relating to alleged improper framing installation implemented by McDaniel, summary judgment [was] not proper at this time." (A. p. 1553). BFS further argued:

> Even if McDaniel secured an issue release or Plaintiffs stipulated there are no defects in McDaniel's scope, **BFS still has a viable claim for contractual indemnity that obligates McDaniel to pay the defense costs incurred by BFS in defending against Plaintiffs' claims regarding McDaniel's alleged improper scope of work.** Until such a release or stipulation is executed, BFS will continue to incur defense costs arising out of or relating to the acts or omissions of McDaniel's scope of work.

(A. p. 1554) (emphasis added).

BFS argued that its indemnity claim against McDaniel was not subject to collateral estoppel and did not run afoul of Concord & Cumberland or the South Carolina Anti-Indemnity Statute[12] because BFS was only seeking indemnity against liability for damages occasioned by the negligent acts or omissions of its subcontractor McDaniel. (ROA p. 1565).

The circuit court granted McDaniel's motion and rejected BFS's arguments. (ROA pp. 1601-1603; ROA p. 1565). BFS did not move for reconsideration, alteration, or amendment of the Form 4 Order. Nor did it appeal the order. WSC took the position in the lower court that Judge Price's order was a final order and is now the law of the case as it relates to BFS's claims against its subcontractors for its attorney's fees.

ARGUMENT

This case is aptly titled the "Retreat." BFS started this case by asserting a whole host of claims against its subcontractors, including many claims it admitted failed as a matter of law, through which BFS sought the broadest form of indemnification and fullest extent of damages from its subcontractors. BFS has since retreated from these positions.

Currently, BFS asks this Court to allow it to retreat from certain provisions of its master, form subcontractor agreement (which it drafted), its pleadings (which it has not amended), and certain elements of damages that it has claimed (without any framework for doing so). The acrobatics that must be performed to save some portion of BFS's contractual indemnity claim would require a judicial rewriting of BFS's agreement, and open the door to large, powerful players, particularly in the construction industry, shifting liability downstream and losing accountability to homebuyers and owners in South Carolina, and burden trial courts with

[12] The South Carolina Anti-Indemnity Statute is codified at S.C. Code § 32-2-10. It is hereinafter cited by Code section or referred to as the "Anti-Indemnity Statute."

determining liability among indemnitors and indemnitees in cases where the primary claims are often resolved by way of settlement without specific findings of fault. It is unfair to third and fourth tier subcontractors and would produce undesirable results. This Court should follow the courts below and find that BFS is bound to its pleadings and contract because, even still, BFS is seeking to be indemnified against its sole or concurrent negligence based on a contract that violates the South Carolina Anti-Indemnity Statute and the heightened clear and unequivocal standard.

As will be further explained herein, the problems with BFS's agreement render the agreement wholly unenforceable. BFS's efforts to isolate judicial review or enforcement to certain clauses of its subcontractor agreement and paring down of its claim for relief or sought-after damages does not change the fact that BFS's sole claim – a contractual indemnity claim[13] – rests upon an unenforceable agreement.

WSC is in a unique position to further demonstrate to this Court that even if this Court were inclined to entertain BFS's plea to ignore certain aspects of its claims and rewrite its contract, doing so still requires enforcement of the provisions BFS asks this Court to ignore (i.e., the troublesome provisions). BFS attempts to deflect from this reality by focusing this appeal on the damages it seeks on account of liability it may incur to Plaintiffs due its subcontractor-Respondents' negligence.

The very presence of WSC as a Respondent to this appeal reveals this is not the only form of damages BFS seeks through its contractual indemnity claim.

[13] The circuit court dismissed BFS's common law or equitable indemnity claim, which BFS did not take issue with on its prior appeal. BFS has abandoned that issue on appeal, despite its repeated references to such claim in its Brief. See Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.").

BFS is *actually* seeking to recover:

(1) Any liability it may incur to Plaintiffs on account of its subcontractors' negligence or its derivative liability flowing therefrom[14]; -*plus*-

(2) All of its attorney's fees, without regard to its negligence.

WSC's settlement with Plaintiffs, which incorporated the issue release, occurred in 2019, two years before the circuit court dismissed BFS's crossclaims against WSC. Still, BFS appealed the order dismissing WSC from this case and has dragged WSC through these appeals. BFS's decision to do so is not because BFS was concerned about being indemnified by WSC against liability owing to Plaintiffs, but because BFS wants WSC to pay its attorney's fees.

This fact does not work well with BFS's current argument, so BFS is silent on the issue.[15] In fact, the only mention of "attorney's fees" or "fees" in BFS's 44-page Brief are excerpts to the record (i.e., various portions of BFS's master subcontractor agreement and pleadings). Despite BFS's effort to distract from the issue, it is, no doubt, attempting to capture its attorney's fees as an element of its claimed damages on its contractual indemnity claim. There is no basis for WSC to be in this appeal but for BFS's claim for attorney's fees.

BFS cannot recover its attorney's fees from WSC in indemnity or its other subcontractors for that matter, because this Court declined review the court of appeal's finding that BFS's claim for attorney's fees were within the scope of the Anti-Indemnity Statute, S.C. Code § 32-2-10. This

[14] It is incontrovertible that the issue release completely eliminates any risk to BFS being held liable to Plaintiffs on account of any issues arising from WSC's work or its hand therein, therefore, WSC does not focus its brief on this element of damages BFS claims. To the extent BFS deviates from its prior position as to this issue, WSC adopts and incorporates the co-Respondents' arguments on this subject to the extent they are not inconsistent with anything WSC states herein.

[15] BFS likely also recognizes this Court declined certiorari of the attorney fee issue and, in this respect, it is appropriate that BFS did not brief the issue.

issue alone should be dispositive of BFS's limited contractual indemnity claim against WSC; however, WSC further asserts that BFS's pursuit of attorney's fees from its subcontractors without any regard to its fault negates BFS's assertion that the lower courts erred in applying the "clear and unequivocal" standard and Anti-Indemnity Statute.

The court of appeals reviewed BFS's claims and contract under the proper standards, reached the right result, and its decision should be affirmed for these reasons.

I. The court of appeals' decision on the applicability of S.C. Code § 32-2-10 to BFS's claim for attorney's fees is final, and outside the scope of this Court's review. WSC should be dismissed from this appeal.

WSC should not be a Respondent to this appeal because this Court declined to grant certiorari as to the singular issue BFS preserved on appeal as it relates to its ability to recover its attorney's fees.

The court of appeals issued its order affirming the trial court's orders on February 12, 2025. BFS filed a petition for rehearing on February 27, 2025. On May 21, 2025, the court of appeals issued a substituted opinion denying the petition for rehearing. Upon denial of this petition for rehearing, the decision of the court of appeals became final. See Rule 242(c), SCACR (providing a decision of the court of appeals is not final for the purposes of review by the Supreme Court until the petition for rehearing or reinstatement has been acted upon by the court of appeals).

On June 20, 2025, BFS filed its petition for writ of certiorari with this Court proposing six questions for review. In response, the Respondents each filed a reply asserting the Court should deny the Petition. Via Order dated December 16, 2025, this Court granted certiorari as to five of the six questions presented and informed the parties of the decision in accord with the South Carolina Appellate Court Rules. See SCACR 242(b) ("A writ of certiorari is not a matter of right, but of sound judicial discretion.") and SCACR 242(i) (stating a petition for certiorari to the

Supreme Court "may be granted or denied on any question presented. If the petition is granted, the Clerk shall notify each party or each party's attorney specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s).").

The question that this Court denied was, as follows:

> Does S.C. Code Section 32-2-10 by its specific provisions apply only to agreements in indemnification, and does its silence regarding attorneys' fees reflect both legislative intent and a common law imperative that attorneys' fees do not fall within the scope of Section 32-2-10?

(A. pp. 1628-1629).

The court of appeals held that the contractual language BFS looks to in support of its contractual indemnity claims, including the language in Sections 3, 5, and 8 of the Later Contracts, violated S.C. Code § 32-2-10 and South Carolina public policy. (Opinion, A. pp. 1555-1557). This aspect of the court of appeals' decision remains undisturbed given the denial of review of this question and BFS should be precluded from further asserting its argument that the attorney's fees provisions fall outside the scope of S.C. Code § 32-2-10.

This Court should dismiss WSC from this appeal on this basis alone and, to the extent necessary, affirm the lower court's ruling on the issue of the attorney's fee provisions running afoul of S.C. Code § 32-2-10.

II. BFS's contractual indemnity claim for attorney's fees is based on indemnity language contained in its master subcontractor agreement that is illegal, enforceable, and void as against public policy. The court of appeals properly applied S.C. Code § 32-2-10 and the clear and unequivocal standard to the attorney's fee language because it is without regard to BFS's fault.

BFS's right to recover damages is based upon the indemnity language set out in its master subcontractor agreement. While attorney's fees and costs are generally recoverable elements of damages where a subcontractor has contractually agreed to indemnify a contractor or owner, see Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971), BFS cannot recover attorney's fees

and costs from WCS in this case because such claims rely on the indemnity provision of the master subcontractor agreement which is fatally flawed. See Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966) (providing that contractual attorney's fee recovery clauses must comply with South Carolina law).

A. The duty to defend and attorney's fee provisions of BFS's master subcontractor agreement require BFS's subcontractors to indemnify BFS for its attorney's fees without regard for fault.

The Anti-Indemnity Statute, S.C. Code § 32-2-10, renders a promise or agreement in connection with the construction of a building purporting to indemnify the promise against liability for damages arising out of property damages proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and enforceable. That's exactly what the BFS's master subcontractor agreement purports to do and precisely the relief BFS is seeking from WSC.

Section 5 "Indemnity" section of BFS's master subcontractor agreement states as follows:

> **. . . THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. . . .**

(A. p. 1495) (underline emphasis added).

This is not the only indemnity provision within the master subcontractor agreement that requires WSC to indemnify BFS for BFS's attorney's fees and costs without regard to BFS's sole or concurrent negligence. [16]

[16] The language quoted above, drawn from Section 5 of the master subcontractor agreement, is not the only indemnity provision that requires WSC to indemnify BFS for its attorney's fees and costs where BFS is solely negligent. See (A. p. 1494) (**"TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACT, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY**

A plain reading of the Anti-Indemnity Statute, S.C. Code § 32-2-10, supports the lower courts' conclusions that the indemnity provisions contained in the master subcontractor agreement are wholly enforceable. See S.C. Code § 32-2-10 ("a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promise . . . against liability for damages arising out of bodily injury or property damage is against public policy and unenforceable") (emphasis added).

The statute does not provide that the specific clause, paragraph, or subsection of such agreements that run afoul of the statute are unenforceable. It provides ***the agreement*** is against public policy and unenforceable as a matter of law. Moreover, if there's any doubt as to the absolute nature of this rule, the statute provides this rule is true "notwithstanding any other provision of law." S.C. Code § 32-2-10.

In D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, the Court of Appeals held that an indemnity provision requiring a subcontractor to indemnify a contractor for damages

---

MECHANICS' AND MATERIALMENS' LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE 'INDEMNITEES') FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTORS, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.") (underline emphasis added). The same is true of the indemnity provisions found in Section 8i. (A. p. 1499).

caused by the contractor's own negligence violated § 32-2-10 rendering the contract void as against public policy. 422 S.C. 144, 152, 810 S.E.2d 41, 45–46 (Ct. App. 2018). Because the agreement violated the statute, the court refused to require the indemnitor (BFS) to pay damages caused by the indemnitee's (D.R. Horton) negligence. Id. The Court reaffirmed the longstanding principle that "an illegal contract is unenforceable." Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002).

The Supreme Court has consistently held that "courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342 (2004) (citing Berkebile v. Outen, 311 S.C. 50, 53-54, 426 S.E.2d 760, 762 (1993) stating that "an illegal contract has always been unenforceable").

Nothing in South Carolina law permits a contractor to recover defense costs for claims arising from its own negligence where the Anti-Indemnity Statute would otherwise prohibit indemnification. It is well-established under South Carolina law that "attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses" associated with a contractual indemnity claim. See McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) (citing Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971)); see also Fountain v. Fred's, Inc., 429 S.C. 533, 556–57, 839 S.E.2d 475, 488 (Ct. App. 2020), reh'g denied (Mar. 30, 2020), cert. granted (May 28, 2021); Sherlock Holmes Pub, Inc. v. City of Columbia, 389 S.C. 77, 697 S.E.2d 619 (Ct. App. 2020); 22 Am. Jur. 2d, Damages, § 166, pp. 235-236.

In fact, BFS pled it was entitled to attorney's fees and costs on its indemnity cause of action. (A. pp. 440-441). ("The BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on part of the Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, of which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims."). BFS's own pleading acknowledges that attorney's fees and costs are recoverable items of damages on a contractual indemnity claim.

There is no support for BFS's argument that S.C. Code § 32-2-10's reference to "damages" does not include attorney's fees and costs. The court of appeals correctly applied the statute and properly declined to enforce a contractual provision that contravenes South Carolina public policy.

B. The indemnity provisions in BFS's master subcontractor agreement for attorney's fees are not stated clearly and unequivocally, further rendering the agreement unenforceable.

These same provisions also fail under South Carolina's clear and unequivocal standard governing contractual indemnification.[17]

[17] BFS argued the indemnity provisions relating to its claim for attorney's fees and costs (which applies regardless of BFS's sole negligence) are not subject to S.C. Code § 32-2-10, but BFS has not argued on appeal these indemnity provisions are not subject to Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018) (reh'g denied). This issue should be considered abandoned on appeal, Fields v. Melrose, Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283 (Ct. App. 1993), but even if this Court interprets BFS's general arguments as to Concord & Cumberland to apply to its claims against WCS, these terms are subject to the clear and unequivocal standard and do not satisfy it.

South Carolina courts strictly construe contractual provisions that purport to relieve a party from the consequences of its own negligence. Federal Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 27, 378 S.E.2d 56, 58 (1989). Such provisions are enforceable only when the parties' intent to shift liability for the indemnitee's own negligence is expressed in "clear and unequivocal" language. Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 409 S.C. 490, 501, 762 S.E.2d 696, 702 (2014); Concord and Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166 (Ct. App. 2018). This standard applies whenever a contract's scope is broad enough to encompass the indemnitee's own negligence. Courts look to the objective language of the agreement, rather than a party's later self-serving characterization of its claims. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language"). The court of appeals correctly applied that settled framework.

The indemnity provisions in BFS's master subcontractor agreement, including those relating to defense costs and attorney's fees are not clear and unequivocal, as required by Concord & Cumberland, making those provisions unenforceable as a matter of law.

BFS relies primarily on paragraph 1 of Section 5, which purports to limit indemnity damages to those damages caused "in whole or in part" by the subcontractor. (A. p. 1482). This directly conflicts with the language in paragraph 3 that follows, which states that the subcontractor's obligation is "regardless of any ultimate liability or negligence" of BFS. (A. p. 1495). Paragraph 1 of section 5 is also the same language the court of appeals reviewed in Concord & Cumberland, finding it does not satisfy the "clear and unequivocal" standard.

These provisions cannot be reconciled with BFS's assertion that the agreement was

intended to apply only to subcontractor negligence. As the drafter of these conflicting provisions, any uncertainty as to the meaning of the terms must be construed against BFS. Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814, 817 (Ct. App. 2009).

BFS attempts to explain away the ambiguities between the various indemnity provisions by looking at the context of the paragraphs containing the text. This misses the mark. If BFS has to explain to the Respondents and the Court what it meant to say, how it meant for various provisions to apply and interact with each other, and how one can interpret the ambiguities among the various conflicting provisions, the indemnity clause does not express the intention in clear and unequivocal terms. Concord & Cumberland, 424 S.C at 647, 171.

The lower courts properly applied this heightened standard of review to find that the indemnity provisions in BFS's master subcontractor agreement are neither clear, nor unequivocal. The court of appeals' opinion should be denied on these additional bases.

CONCLUSION

BFS does not wish to sever the attorney's fees clauses out of its master subcontractor agreement. It wants to fully enforce those provisions notwithstanding S.C. Code § 32-2-10 and Concord & Cumberland. BFS cannot do that for reasons decided below. For these reasons, in addition to those set out in the co-Respondent's Briefs, this Court should affirm the court of appeals' decision in this case and/or dismiss WSC from this appeal.

Respectfully Submitted,

WALKER GRESSETTE & LINTON, LLC

s/ Jennifer S. Ivey
John P. Linton, Jr. (SC Bar # 79130)
Jennifer S. Ivey (SC Bar # 102533)
P.O. Box 22167
Charleston, SC 29413

Phone: (843) 727-2200
Linton@wglfirm.com
Ivey@wglfirm.com

Attorneys for Respondent WS Contractors, LLC

March 18, 2026
Charleston, South Carolina